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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PAUL L. TEMPLE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Paul L. Temple, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 20, 1964.

JUDGMENT AND OPINION OF THE COURT BELOW

On April 20, 1964, the United States Court of Appeals for the Fifth Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Georgia, sentencing the defendant to imprisonment for a term of two years. The opinion of the Court of Appeals has not as yet been reported. It is printed herewith as Appendix "A".

JURISDICTIONAL STATEMENT

On a jury trial, defendant was convicted of using the United States mails in a scheme to defraud and to obtain money and property by false pretenses in violation of Section 1341, Title 18, U.S. Code.

On appeal to United States Court of Appeals for the Fifth Circuit, the judgment of conviction was affirmed in an opinion filed April 20, 1964 (Appendix "A").

A petition for rehearing was timely filed, and was denied on May 28, 1964. This petition is being filed within thirty days from the said date.

The jurisdiction of this Court is invoked under the provisions of Title 28, U.S. Code 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the defendant enjoy the right to have the assistance of counsel for his defense, as contemplated by the Sixth Amendment to the Constitution of the United States?

Does the Sixth Amendment, or any interpretation thereof, make a distinction between the incompetence or gross negligence of an appointed counsel and counsel selected by the defendant?

2. Were the letters described in Counts 8, 10, 11, 12, 13 and 14 on which the jury found the defendant guilty, mailed for the purpose of executing the scheme described in the indictment?

3. Did not the Trial Court err in limiting the defendant's right to a cross-examination, by directing that only one counsel among three lawyers representing three defendants could cross-examine government witnesses notwithstanding that the Trial Court reserved the right to each attorney to ask any *special* questions that relates to his client, and further stating that he didn't want three general cross-examinations?

4. Was not the testimony and evidence of the Government regarding passing "NSF" checks and failing to pay his bills, occurring long before the beginning date of the scheme erroneous and prejudicial? And was not the argument of Government Counsel to the jury with respect thereto equally erroneous and prejudicial?

5. Did not the Court err in instructing the jury:
   By giving confusing instructions?
   By giving instructions repugnant to each other?

CONSTITUTIONAL SECTIONS AND STATUTES INVOLVED

Sixth Amendment to the Constitution of the United States.

Section 1391, Title 18, U.S. Code.

Title 22, Sections 1839 and 1843.1 (Corporations) of the Code of Georgia.

STATEMENT OF THE CASE.

Defendant, Paul L. Temple, and two others, Eva Woodall and Roy E. Bishop, were indicted for devising a scheme to defraud D.D. Dominey, Sr., J. Austin Dilbeck and other individuals, the Georgia Casualty and Surety Company, its directors, shareholders and policy owners, and to obtain money and property by false pretenses (R, 4-8).

The indictment consists of fourteen counts, each of which charges a separate mailing.

Judgment of acquittal was entered by the Court as to all defendants on Counts 3, 7 and 9 at the close of the Government's case (R. 679), and as to Eva Woodall on Counts 1 and 2 at the same time (R. 929). The jury found Eva Woodall not guilty on Counts 4, 5, 6, 8, 10, 11, 12, 13 and 14 (R. 1025); it found the defendant, Paul L. Temple, not guilty on Counts 1, 2, 4, 5 and 6. It found him guilty on Counts 8, 10, 11, 12, 13 and 14 (R. 1025).

The court also entered judgment of acquittal as to Roy Bishop on all counts (R. 929).

The Trial Court sentenced Mr. Temple to the custody of the Attorney General for a period of two years (R. 1033).

The defendants were charged individually, and doing business as Paul Temple and Associates and as Thrift Corporation of America, aided and abetted by each other, with devising the scheme to defraud. Briefly, the scheme and the misrepresentations recited in the indictment were that the Thrift Corporation of America was a Delaware corporation; that it would purchase at $2.00 a share the stock of Georgia Casualty and Surety Company owned by the aforesaid Dominey and Dilbeck and their families; that

it would purchase from the said insurance company at the same time 190,000 shares of insurance stock of the said insurance company at $5.00 a share; that the Thrift Corporation would maintain the market value of insurance stock at $2.60 a share for a period of six months; that it had $950,000.00 for the purpose of purchasing said stock from the insurance company; that the Investors Finance and Thrift Corporation, of Chicago, would provide a large part of the financing to purchase the stock of the said insurance company; that the defendants had assets in excess of $28,000,000.00 to back up the purchase of said stock; that the directors and officers of Eagle Fire Insurance Company, of New Jersey, had agreed to merge with the Georgia Casualty Company, and that the new company would be known as the Eagle Fire and Casualty Company; that the merger would be effected by an exchange of stock; that the purported merger was "all set"; that the Investors Finance and Thrift Corporation would furnish up to $2,700,000.00 to purchase the stock of the Georgia Casualty Company and the alleged merger; that the Thrift Corporation had a binding commitment to cover the proposed stock purchases; that the Georgia Casualty stock would be purchased with funds of the said Thrift Corporation or of the Investors Finance and Thrift Corporation; that Investors Finance and Thrift Corporation was financing purchase of the stock of Georgia Casualty but wanted its name stricken from the contract of sale because it would interfere with a sale of the stock of the Investor Finance and Thrift Corporation; that the stock of the Georgia Casualty would be purchased with funds other than the funds of said Georgia Casualty; that certain named parties agreed to serve as directors of Georgia Casualty; that a meeting of the said purported new directors was held in Atlanta on June 18, 1960; that expenses were due the

said directors for said meeting; that at said meeting the directors authorized defendants Roy E. Bishop and Eva Woodall, who were at that time president and secretary of the Georgia Casualty Company to borrow $300,000.00 in the name of the Georgia Casualty.

The indictment further charged that the scheme included false representations by the defendants to the said "victims" by means of letters sent to them and by means of conversations between Temple and said victims; that the defendants obtained the services of H. McKay Twomby to act as their agent in purchasing control of the Georgia Casualty, and that the said Twomby will be used as a sort of "window-dressing" to allay the apprehensions of the victims regarding the defendants' financial condition; that on January 18, 1960 Temple displayed to the directors of Georgia Casualty a fictitious letter purporting to be signed by O.T. Hogan which stated that Investors Finance and Thrift Corporation would furnish up to $2,700,000.00 for the purchase of Georgia Casualty stock, and displayed to them a fictitious bank check on a bank account of Thrift Corporation in the sum of $950,000.00 for the purchase of 190,000 shares of Georgia Casualty; that on January 18, 1960 the defendants induced the board of directors of Georgia Casualty to resign and to name Roy E. Bishop as President, Paul Temple as Chairman of the Board of Directors, and Eva Woodall as Secretary of Georgia Casualty; that the defendants at the same time represented to the officers that they had agreements from certain named persons to act as new directors who were at that time in Atlanta; that on January 18, 1960, without the knowledge of the aforesaid officers of the Casualty Company, obtained from the Treasurer of the Georgia Casualty three checks which the defendants filled out in the sum of $750,000.00, of which sum they deposited $700,000.00

in the checking account of the Thrift Corporation; that on January 18, 1960 they purchased from Dominey, Sr., Dominey, Jr., Dilbeck and members of their families controlling stock in the Georgia Casualty for $532,539.80 and paid for the same with checks from the Thrift Corporation on its aforesaid account; that the defendants on the same account withdrew from the Thrift account $123,745.00 and dispersed the said monies into various bank accounts of the defendants in and about Chicago. (R. 3-9.)

THE GOVERNMENT'S CASE

On December 15, 1959, Mr. Temple met with Austin Dilbeck and Mr. Dominey, Sr., at the offices of the Georgia Casualty Company. At this meeting Mr. Dilbeck produced U.S. Exhibit No. 1, the original contract between the Thrift Corporation of America and Dominey and Dilbeck. (R. 62-63.)

This contract was dated January 18, 1960, and therein Thrift Corporation of America agreed to purchase from Dominey and Dilbeck 200,000 shares of Georgia Casualty, at $2.60 per share, and, at the same time, it agreed to purchase from the Georgia Casualty an additional 190,000 shares at $5.00 per share. The words "Investors Finance and Thrift Corporation", appearing in the contract, were scratched out. (See U.S. Exhibit No. 1.)

On December 29, 1960, Mr. Temple had a financial statement of the Investors Finance and Thrift Corporation showing its worth to be $28,000,000.00 and that it was backing the merger. A director of the Casualty Company prepared a contract in which Investors Finance and Thrift Corporation was one of the parties; on January 14, 1960, Mr. Temple said that corporation could not sign the contract but had a letter from them in which they agreed to put up $2,750,000.00 to put through a merger. (R. 67-68.)

On January 15, 1960, Temple, Woodall and Bishop asked Mr. Dilbeck if Mr. Hutcheson, the company treasurer, would take them to the vaults of the C & S Bank in Atlanta for the purpose of checking the company's stocks and bonds. (R. 71.)

The witness took Miss Woodall and Mr. Bishop to see Frank Davis at the First National Bank where the Georgia Casualty had its checking account. This took place on the morning of January 18. (R. 73.)

Mr. Dilbeck testified that Temple, on January 18, wanted the Investors Finance and Thrift Corporation removed from the contract because it had filed an application with the SEC to sell its stock and the application would have to be changed. (R. 75.)

The Georgia Casualty Company had a loss of $340,000.00 up to October, 1959 (R. 102), and carried 43,000 shares of General Assurance Company stock which cost the Georgia Casualty Company $12.00 per share. It also carried on its books real estate on West Peachtree Street at $120,000.00.

In December of 1960, Dilbeck spoke with H. McKay Twombly, a broker with Stieglitz and Company of New York, a brokerage company with a favorable reputation. Twombly and Bishop suggested that the Georgia Casualty write to its shareholders to determine if they would trade their stock and receive one (1) share of General Assurance Company for each four and two-thirds (4⅔) share of Georgia Casualty held by them. (R. 107.) Temple told Diebach that the books of Georgia Casualty showed it paid $4.00 per share for 43,000 shares of General Assurance stock and that the company was carrying this stock on its books at $12.00 a share. Temple also told Dilbeck that his client was not willing to buy the Peach-

tree property at its value of $120,000.00 on the books of the Georgia Casualty Company, and he wanted that out before he would buy the Georgia stock. Mr. Dominey agreed to purchase from the Georgia Casualty Company all the General Assurance stock at $12.00 per share. (R. 107-108.)

On November 19, 1959, Mr. Twombly wrote a letter to the Georgia Casualty informing it that the purchase of the stock was halted until Mr. Temple, who was in the hospital, could be present in person. (R. 119.) In order to merge the Georgia Casualty with any other company, it was necessary to call a directors' meeting and get the approval of the stockholders. (R. 123.) The officers of the Georgia Casualty were getting ready to send out the notice, but the stockholders' meeting was called by the purchasers of the company for January 30. (R. 124.)

Mr. Dilbeck testified that the original negotiations took place between him and Dominey and Mr. McKay Twombly; about December 8, 1959, Stieglitz and Co. decided they would not go further with the transaction. Prior to that time Mr. Twombly was to be the president of the company (R. 148.) The transaction with the defendants began on or about January 14, four days before its culmination. (R. 150.)

Mr. Dilbeck saw a letter from Investors Finance and Thrift Corporation directed to Mr. Temple that they were financing him to the extent of $2,700,000.00 for the merger with Eagle Fire and Georgia Casualty. Temple said he would give Mr. Dilbeck a copy but Dilbeck never received it. (R. 166.) On January 18, Temple had a check for $950,000.00 to purchase 190,000 shares of the Georgia Casualty; he did not know who had the check the last time he saw it. There were several in the office who were looking at it. (R. 167.)

R. Albert Minton testified that he was the president of the Eagle Fire Insurance Company of New Jersey and had no knowledge of a proposed merger between Eagle Fire Insurance Company and Georgia Casualty Company until late in January. (R. 185.) No such negotiations were carried on with any officer of or with the Board of the Eagle Fire Insurance Company. (R. 186.)

D. D. Dominey, Sr., the chairman of the Board of the Georgia Casualty emeritus, had conversations with Mr. Temple about a merger or about buying his interest in the Georgia Casualty; this later developed into buying and merging of the company with another one. (R. 194.) About December 20 or 21, Temple came into the office where Dominey and Dilbeck were present and brought a financial statement of Investors Finance and Thrift Corporation showing that they had assets of $28,000,000.00 and were backing the purchase of the Georgia Casualty and merging it with another company. (R. 194.) A contract was prepared and mailed to Mr. Temple, and about January 15 he came into the Georgia Casualty office with the contract. The reference to the Investors Finance and Thrift Corporation was scratched out. (R. 195.) Temple said that they were filing with the Securities Commission for a large block of stock. At the same meeting, Temple brought in a letter signed by Mr. Hogan of the Investors Finance and Thrift Corporation and that they were backing the transaction to the tune of $2,700,000.00. Another letter produced by Mr. Temple stated that the Investors Finance had done business with Temple for a period of years and that he had handled a number of deals for them. (R. 196.) Temple said he would make copies of these letters for Dominey but he never gave the copies to him. (R. 196-197.)

D. Dominey, Sr., identified a number of checks of the Thrift Corporation of America dated January 18, 1960, drawn on the First National Bank of Atlanta, all of which were admitted into evidence, without objection. (R. 672-674.) These checks were in payment to Dominey and Dilbeck and their families for the shares of stock owned by them.

Mr. Dominey, Sr., found that Temple had transferred funds from the Georgia Casualty to the Thrift Corporation and had paid the witness and his associates with their own money. (R. 206.) Dominey, Sr., asked Temple if he were sure that the Eagle Fire deal was all set and Temple said there was nothing to worry about: "we have full control of Eagle Fire". (R. 208-210.) These conversations with Temple started back in August or September of 1959. Dominey, Sr., testified that there were two agreements. The first one was with Mr. Temple and Mr. Twombly; this deal fell through and Temple came back with a second deal in which he stated that he was representing a Chicago office. (R. 221.) The first deal was with Stieglitz & Company and Temple and fell through in December. (R. 269.)

On or about January 25, 1960, Mr. Temple and Miss Woodall called on Dewey Moore, a cashier of the First National Bank in Atlanta. They brought in some certificates of stock signed by Mr. Temple and Miss Woodall and wanted the bank to guarantee the signatures, to make them negotiable. (R. 312-314.) Miss Woodall and Temple told the vice-president of the bank on January 25 that they wanted to sell the said securities through a broker in Chicago. (R. 337-338.) The bank, however, decided that it would not guarantee the signatures, but retained the stocks and returned them to the Georgia Casualty. (R. 340.)

It appears that there was no record of the incorporation of the Thrift Corporation among the records of the Corporation Department for the State of Delaware (R. 374-375.) A charter of the Insurance Investment Corporation appeared in those records. (R. 379.)

Mr. Hogan was a substantial stockholder of the Investors Finance and Thrift Corporation during 1958 and 1959. He could not remember making a commitment for the purchase of the Georgia Casualty and Surety Company stock, nor did he ever write any letters stating he backed the purchase of the Georgia Casualty by any other company. (R. 391-392.) In December of 1959 he might have talked with Mr. Temple about Eagle Fire Insurance Company. Temple had helped the United Insurance Company of America, in which Hogan owned a considerable amount of stock, to merge at least twenty-five companies, and Temple's efforts contributed very much to the success of the United Insurance, known as the fastest growing company in America (R. 349), with assets of $160,000.00. Hogan's net worth is over $20,000,000.00. (R. 349.) If Temple had told Hogan that he was working on the Eagle Fire and a Georgia company and had asked him if he would be interested or not, Hogan would present the facts to the board of directors who approves mergers. (R. 396-397.) Temple earned about $2,000,000.00. On January 18, 1960, Miss Woodall asked H. Y. Hutcheson, the Treasurer of the Georgia Casualty and Surety Company, for three blank checks. She said the money would be needed in the process of a merger with the Eagle Fire Insurance Company. They were cashed and returned to the Georgia Casualty Company by its bank. (R. 523.) Two of these checks were deposited on January 18, 1960, in the account of the Thrift Corporation of America at the First National Bank. One was in the sum of $400,000.00 and the other in the sum

of $300,000.00. Both were dated January 18, 1960 and were signed: Georgia Casualty and Surety Company, and Roy E. Bishop and Paul Temple. (See U. S. Exhibit Nos. 23, 25 and 26.)

Mr. Hutcheson visited the safety deposit box of Georgia Casualty on January 19 and found six debenture bonds of the Thrift Corporation of America, U.S. Exhibit No. 100. (R. 563.)

D. D. Dominey, Jr., together with Miss Woodall, prepared the notice to the stockholders for a special meeting of the stockholders of Georgia Casualty Company to be held January 30, 1960; and enclosed a proxy form. (R. 588-589.) He also prepared defense Exhibit No. 21, dated January 20, 1960, which was also mailed to each shareholder. (R. 588-589.) Examination of this exhibit indicates it was signed by D. D. Dominey, Jr. and stated Georgia Casualty received a proposal to merge with the Eagle Fire Insurance Company and the directors had favorably considered this proposal. The merger would be effected by an exchange of one and one-half shares of the common stock of the Georgia Casualty Company for one share of the capital stock of Eagle Fire Insurance Company.

E. R. Smith, Jeanette Plaster, John D. Saunders, H. Fred Gober, James W. Means and George S. Barnes, stockholders in the Georgia Casualty and Surety Company, received the letter, notice of stockholders' meeting and proxy card, described by D. D. Dominey, Jr., through the mails. They were, respectively, the recipients of the letters described in Counts 8, 10, 11, 12, 13 and 14, on which Mr. Temple was found guilty.

U. S. Exhibit No. 31 is a requisition for cashiers' checks dated January 19, 1960, on the stationary of the Thrift Corporation, payable to the following:

Georgeann W. Geist	$ 5,000.00
Insurance Investors Corp. of Chicago	30,000.00
Paul Temple	15,000.00
Eva Woodall	15,000.00
Thrift Corporation	30,000.00

Attached thereto is a requisition on the First National Bank for cashiers' checks on Chicago funds to the following:

Roy E. Bishop Advertising Agency	$ 5,900.00
Eva Woodall	7,500.00
Hilton Carte Blanche	800.00
Edgewater Beach Hotel	129.00
Higgins, Frank & Hill	2,500.00
Northwest Orient Airlines	33.94
1st Nat'l. Bank & Trust Co. of Evanston	1,997.50
Theodore Gaines	2,000.00
American Express Co.	297.22
Delta Air Lines	104.70
Texaco, Inc.	232.88
Paul Temple	3,000.00

Pursuant to the foregoing requisitions, the First National Bank issued its cashiers' checks, each respectively dated January 19, 1960. These are U. S. Exhibits as follows:

Ex. No. 32, to the Thrift Corporation of America, for $35,000.00.

Ex. No. 33, to Eva Woodall for $15,000.00.

Ex. No. 34, to Paul Temple for $15,000.00.

Ex. No. 35, to Insurance Investment Corporation of Chicago, for $30,000.00.

Ex. No. 36, to Georgeann W. Geist for $5,000.00.

Ex. No. 37, to Paul Temple for $3,000.00.

Ex. No. 38, to Texaco, Inc. for $232.88.

Ex. No. 39, to Delta Air Lines for $104.70.

Ex. No. 40, to American Express Company for $297.22.

Ex. No. 41, to Theodore Gaines for $2,000.00.

Ex. No. 42, to Theodore Gaines for $50.00.

Ex. No. 43, to First National Bank & Trust Company of Evanston for $1,997.50.

Ex. No. 44, to Northwest Orient Airlines for $33.94.

Ex. No. 45, to Higgins, Frank & Hill for $2,500.00.

Ex. No. 46, to Edgewater Beach Hotel for $129.00.

Ex. No. 47, to Eva Woodall for $7,500.00.

Ex. No. 48, to Roy Bishop Advertising Agency for $5,000.00.

U. S. Exhibits Nos. 50 and 51 were checks of the Thrift Corporation of America, each dated January 19, 1960, to the order of the First National Bank, in the sum of $100,000.00 and $23,745.24, respectively, in payment of the foregoing cashiers' checks.

Mr. Temple gave Mr. Dilbeck a list of the new directors he wanted elected to succeed the old directors. They were to convene in Mr. Temple's room in the Piedmont Hotel at two o'clock on January 18, 1960. They were Roy E. Bishop, M. Henry Chernay, Winfield Jackson, Robert McDonald, A. R. Miller, Charles E. Shepherd, Paul Temple and Eva Woodall (R. 169), Chernay (R. 385-390), Shepherd (R. 410-415), McDonald (R. 415-418), and Jackson

(R. 419-422.) Each testified that he did not attend the meeting of the Board of Directors of the Georgia Casualty on January 18, 1960, nor did he agree to serve as a director.

EVIDENCE OF THE DEFENDANT

Joseph Schildret owned 20,000 shares in the Eagle Fire Insurance Company as of January, 1960. (R. 693.) With that stock and that of one Mr. Rosenman's stock and the commitments they received for the sale of stock, Mr. Rosenman entered into an agreement to sell a minimum of 260,000 shares of the Eagle Fire stock. (R. 694.) Mr. Minton, the President of Eagle Fire, at that time had 10% of the outstanding issue, or 50,000 shares. In October, 1959, Minton told Mr. Rosenman that he would go along with the deal. A copy of the agreement was delivered to H. McKay Twombly, of Stieglitz and Company. (R. 695.)

On January 21, 1960, Twombly, Temple, Rosenman and Schildret went to the escrow agent, National Bank of Newark. Either Temple or Twombly presented a check for $50,000.00 to be deposited in escrow. Within a week Schildret and Rosenman had about 165,000 shares tendered and much more stock O.K.'d. (R. 696-697.) The stock contemplated in the deposit contract would have afforded an absolute majority of the outstanding stock. (R. 698.)

Schildret had been subpoenaed by the Government as a witness but was not called by it. (R. 699.) Neither Schildret nor Rosenman dealt with Mr. Temple at any time; they dealt with Mr. Twombly of Steiglitz and Company. (R. 701-703.)

Max Rosenman in January of 1960 was a retired certified public accountant. (R. 708.) He was a director (R. 709) of Eagle Fire Insurance Company, and prior to that he

was vice president of the company. In October, 1959, he first learned that Steiglitz and Company planned to acquire shares of Eagle Fire Insurance Company. Most of the stockholders were dissatisfied with the results of the company and they asked him to find a buyer for Eagle Fire. (R. 709.)

Around January 15, he got a phone call from Steiglitz and Company that they were going through with the deal and would bring a check for $50,000.00 to the escrowee. (R. 711.) The stock of Eagle Fire was selling over the counter at $3.50 and the agreement called for a payment of $4.50 per share. (R. 713.) Mr. Minton told a friend of Rosenman's that he would go in the deal if he got $4.50 (R. 713), and later Rosenman asked Mr. Minton point blank, in the presence of Mr. Schildret, whether they would go along with Rosenman, and Minton said he would. That was in November, 1959. (R. 714.) There were general talks of a merger between Eagle Fire and the Georgia Casualty but Rosenman's contract did not specify a merger. (R. 716.)

J. E. Walle, a vice president and director of United Insurance Company, supervised the accounting operation of the United Insurance Company of America and of the Investors Finance and Thrift Corporation. He was also a director of the United and owned about 12,000 shares having a value of about $600,000. During the past 15 years Mr. Temple negotiated for United Life Insurance Company, through reinsurance or merger, in excess of twenty life companies and one fire insurance company. (R. 721.) In every instance of these acquisitions or mergers, Walle found that the facts represented to him by Temple were true. (R. 722.) Since the "blow-up" of the Georgia Casualty transaction, the United Insurance Company has com-

pleted three mergers as a result of Temple's negotiation. (R. 728.) If Mr. Temple had come to him with the Georgia Casualty and Eagle Fire merger or acquisition, with the facts that Walle had since learned, he would help finance Temple. During 1960 Temple had owed Walle's company $345,000.00 for 12 to 18 months. This was for advances and loans. (R. 730.)

The Investors Finance and Thrift Corporation was a holding company whose principal assets were about 45% of the stock of the United Insurance Company. The Investors Finance was liquidated in March, 1961, principally for tax reasons. (R. 719.) At that time its resources amounted to $25,000,000.00.

Temple heard that Eagle Fire Insurance Company of New Jersey was for sale (R.780), and knew that Mr. Hogan of the United Insurance Company was anxious to have his company licensed to do business in New Jersey. (R. 781.) Temple spoke to Mr. Hogan, who was in California, over the phone; Hogan told him he would prefer to have Investors Finance and Thrift Corporation left out of the contract because of his advanced age and tax problems involved in his estate. He planned to make a public offering of the stock of Investors Finance, or, in the alternative, liquidate the company. Temple therefore ruled out the name of Investors Finance and Thrift Corporation from the contract. (R. 790.)

Temple told Mr. Dominey that his attorney, Mr. Gaines, advised him that the by-laws of the Georgia Casualty Company would not permit a wholesale resignation of old directors and the election of new ones. Dominey said it would make no difference and that he had already called a meeting of his directors for January 18, at which time the old directors would resign and new ones would be elected.

795.) Temple's attorney told him not to have his directors down to Atlanta and to wait to have the directors regularly elected. (R. 795-796.)

Temple received a call from Mr. Dominey, Jr. stating the bank balance was $10,000.00 or $11,000.00, and Temple said that was impossible unless Georgia Casualty had paid out a lot of money in the payment of claims that was never disclosed to him. Dominey, Sr. asked Temple to come down to Atlanta (R. 808) and on the night of January 28, he was arrested. (R. 810.) Because of the publicity in the Atlanta papers and the Chicago Tribune, the merger with Eagle Fire and Georgia Casualty was destroyed. (R. 811.) Temple had an unsecured credit line with the Investors Finance and Thrift Corporation; he had arranged with a life insurance company to purchase $450,000.00 of Thrift Corporation debenture bonds, and had arranged with two investment banking firms with whom he had done business for many years to handle the permanent financing, which might have been as much as $3,000,000.00 after the merger was completed. He had no question but what he would be able to accomplish everything that he agreed to. (R. 819.) He did not tell Mr. Dominey or Dilbeck that Investors Finance and Thrift Corporation was engaged in a filing with the S.E.C. (R. 841) and he never showed them a letter of commitment in the amount of $2,700,000. He never had such a letter.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Did Defendant-Appellant have the assistance of counsel for his defense at his trial?

Were not the testimony and evidence regarding Defendant's passing "NSF" checks and failing to pay his bills, together with the District Attorney's argument to the jury with respect thereto, erroneous and prejudicial?

Was not the testimony and evidence of the Government regarding passing "NSF" checks and failing to pay his bills, occurring long before the beginning date of the scheme erroneous and prejudicial? And was not the argument of Government Counsel to the jury with respect thereto equally erroneous and prejudicial?

The Sixth Amendment to the Constitution of the United States provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Court of Appeals for the Second Circuit observed in the case of *United States* v. *Wight*, 176 F.2d 376, 378:

> "There can be no quarrel with the proposition that the right to counsel means the right to the *conscientious* services of competent *counsel*." (Emphasis supplied)

An examination of the record of his trial indicates unequivocally that Mr. Temple did not have the *conscientious* Services of *competent* counsel. Either that or Mr. Temple's attorney was grossly negligent.

On the day of the arraignment of the defendant (R. 48-49) Mr. Temple's attorney suggested that a Chicago lawyer was preparing a motion to dismiss the indictment and he asked for time in which to file the same. The Court answered that if counsel had any motion which he wanted to present the Court would be glad to consider and pass on it. (R. 50-51.) No such motion was filed by Mr. Temple's attorney although a grave doubt exists as to whether the allegation in the indictment that "Paul Temple, Eva Woodall and Roy E. Bishop. . . . *individually*, and doing business as Paul Temple and Associates and as Thrift Corporation of America, *aided and abetted by each other*, devised" a scheme to defraud and to obtain money and property by false pretenses, is not duplicitous and does not contain statements repugnant to each other.

Notwithstanding that Rule 33 of the Rules of Criminal Procedure for the United States District Courts provides that a motion for a new trial must be made within five days after verdict or within such further time as the court may fix during the five day period, and that a motion in arrest of judgment must be made within five days after determination of guilt, no motion for a new trial nor a motion in arrest of judgment was made by Mr. Temple's attorney.

Section 2(a) of Title 18 U.S.C.A., provides that aiders and abettors may be indicted as principals. Where, however, defendants are indicted as aiders and abettors, a principal must be named whom the said defendants aided and abetted. The defendants Temple, Woodall and Bishop were indicted individually and hence the charge that they aided and abetted each other is repugnant to the foregoing allegation.

In *Morgan* v. *United States*, 10 Cir., 1947, 159 F.2d 85, 87, it was held: "One cannot aid and abet in the commission of a crime unless there is another who has committed the offense. In other words, one cannot be an aider and abettor of himself in the commission of an offense . . . It has been held that where one is charged with aiding and abetting it is necessary that the indictment name the person or state that his name is unknown". The Court continued: "No attempt was made therein (Count 2) to state for whom he was acting or that the name of such person was unknown."

It is important to note that the Court further stated that the failure to challenge the legal sufficiency of the Second Count may have waived this defect in the indictment; hence, it was of the utmost importance that Temple's attorney file a motion to dismiss the indictment or file a motion in arrest of judgment.

The Court of Appeals for the Seventh Circuit quoted the foregoing excerpt from the *Morgan* case in *United States* v. *Horton*, 180 F.2d 427, at page 431.

The failure to file a motion for a new trial and a motion in arrest of judgment constituted gross negligence.

Counsel asks this Court to consider the proceedings. Mr. Temple's attorney told the Court that Mr. Callahan of Chicago was preparing a motion to dismiss the indictment, and he believed it was customary to ask for some time after the arraignment to file such motion. The Court did not know of any such custom but told Temple's counsel that if he had any motion that he wanted to present, the Court would be glad to consider and pass on it. Mr. Edwards, the attorney for Eva Woodall, understood the Court's plain language, and said "Thank you, Your Honor.", but Temple's counsel asked, "Do I understand

that I may file a motion to—" and the Court replied, "You understand what I said." (R. 63.) Temple's attorney replied, "I'm sorry, I didn't", and the Court stated, "If you have any motion you want to make with respect to it, file it and the Court will pass on it." To which counsel replied, "I'm sorry to be so obtuse; I just don't know whether I can yet file a motion to dismiss under Your Honor's pronouncement just made or not." The Court replied, "You can determine that for yourself." Apparently still not understanding the Court's clear, simple language, counsel asked, "Your Honor does not grant any time within which to file a motion to dismiss?" The Court said, "No, sir." (R. 52.) Certainly Temple's counsel *was* obtuse. It is manifest that the Trial Court told counsel to present any motion and that he will be glad to consider and pass on it; there was no ambiguity in the Court's statement.

Another serious situation occurred in the trial reflecting upon the competence of this attorney. Government witness Frank Bianco produced invoices and ledger cards of Moeller Brothers, U. S. Exhibit No. 59, showing the purchase of refrigerators and air conditioners by Mr. Temple in the sum of $1660.12. It was paid by U. S. Exhibit No. 74 on January 20, 1960, by check of the Thrift Corporation. When the exhibit was tendered, Mr. Temple's attorney stated:

> "May it please the Court, *I am not sure I know the purpose of it*, but we are willing, I mean for Mr. Temple, to stipulate all the transactions like this that they can produce, or wish to produce; and even the method in how they were paid for. *I don't see any point in a long list of witnesses and invoices.*" (R. 432.)

On question by the Court as to whether there was any objection to the admission of U. S. Exhibit 59, Mr. Temple's attorney answered "No". (R. 434.)

Counsel of long experience should have known the purpose of these exhibits and should not have offered to stipulate to all the transactions like this that the Government could produce. He should have known that these transactions were inadmissible in evidence.

Another situation bears heavily on the question under discussion. George Rasmusson, an employee of a clothing store in Chicago, identified Exhibit 87, a ledger card of Mr. Temple's account at that company, showing purchases of clothing by Mr. Temple from April 9 through June 6, *1958*, including overcoats and suits for $265.00 each. When it was offered, Appellant's counsel objected to it in its entirety "because there appears to be a stamped entry at the top of it, the top left-hand corner". (R. 493.) He asked to cross-examine Mr. Rasmussen *out of the presence of the jury*, stating (R. 494):

> "If your Honor will look at the upper lefthand corner, it is that large letter up there, the meaning of it. I would like to know before I state my objections out of the presence of the jury, what that means."

Thereupon, the Court asked the jury to retire to the corridor and the following cross-examination took place (R. 495):

By Mr. Andrews:

"Q. What is that 'B' up there in the lefthand corner?

A. The 'B', sir, was the way the old Higgins and Frank Store department—

Q. Beg pardon?

A. The 'B' was the way the old Higgins and Frank Store kept their account. The 'B' was the Chicago store; 'A' was the Detroit store.

Q. Well, yes, sir."

By Mr. Andrews:

"Well, that clears it up: I have no objection to it. No objection to it in view of that explanation of that."

What was so important about the letter "B" that the cross-examination of the witness regarding Exhibit 87 had to take place out of the presence of the jury? It is impossible to understand what effect the single capital letter "B" in the upper lefthand corner of Exhibit 87 could have had upon the jury. This cross-examination and the request that it be made outside of the presence of the jury is nothing more than ridiculous.

Another serious situation reflecting on the competence of Mr. Temple's attorney occurred at the conclusion of all of the evidence. Defendant-appellant's counsel moved for a mistrial as follows (R. 938):

> "We wish now to offer a motion for a mistrial, upon the grounds that in the beginning of this case several witnesses testified and identified documents, then the witnesses were excused without any opportunity being had to cross examine about the documents, because at that time this one thing occurred. On the third witness, while the witness of this character was on the stand, I undertook to examine the witness about the meaning of some language in the paragraph of a letter. I read the letter, or started to read a part of it to the Court and Jury, and upon objection, the Court's remark that I was trying, that that had not been admitted in evidence, and that I was trying to put in evidence something that had not been admitted. That resulted from the irregular manner the Government was following, so that the effect of that was to deny us cross-examination of the witness concerning that

document; and the Court's statement that I was trying to do something wrong in that connection, we think, was prejudicial, and we ask Your Honor to declare a mistrial because of that."

Mr. Temple's present counsel cannot find the matter or matters complained of anywhere in the Record, but if the foregoing matters actually occurred, there was grave error; and counsel should have filed a motion for a new trial setting forth these errors and pointing to the Record to substantiate his statement and Temple's attorney should have reserved his point for a review in a motion for a new trial.

Trial counsel many not, upon the rendition of a verdict or finding of guilty, walk out of the courtroom and shed himself of all responsibility with reference to the rights of his client if, in his opinion, the Trial Court has committed an error which may be the main basis for the motion for a new trial.

U. S. Exhibit No. 64 is a check of the Thrift Corporation, dated January 20, 1960, to the order of the Hilton Credit Corporation, for $137.08. This check was in payment of an account existing in May 1959. (R. 448.) Mr. Temple's attorney stated he had no objection to the admission of that exhibit.

Richard Seegar testified he did art work for the Thrift Corporation in the middle of 1959. (R. 454.) He received U.S. Exhibit No. 76, a check for $293.13, dated January 20, 1960, in payment for this work. (R. 506.)

Mr. W. J. Hicks, the night manager of the Edgewater Beach Hotel, testified that the hotel received a check of the Thrift Corporation for $129.00, plus a $4.00 protest fee, to replace a check of Paul Temple returned for insufficient funds. (R. 510.) No objection was made by Mr. Temple's attorney nor did he make a motion to strike the testimony. Mr. Temple's attorney brought out *on cross-*

examination that the Edgewater Beach Hotel had two insufficient funds checks and that his company *issued a statement for a warrant*, and in answer to that his company got this check. Exhibit No. 91, a receipt from the Edgewater Beach Hotel, dated January 20, 1960, was admitted after Mr. Temple's attorney stated—"I don't think we have any objection." (R. 513.)

Bruce Henderson, with Delta Airlines at Atlanta, produced Exhibit No. 93, a returned check for $95.70, given to Delta Airline on November 21, 1959 by Mr. Temple. In the upper righthand corner of Exhibit 93 appear the letters "NSF" in red ink. Mr. Temple's attorney said he had no objection thereto.

Clifford Gasper produced U. S. Exhibits 67 through 80, and when they were offered in evidence, Mr. Whaley, *in the presence of Mr. Temple's attorney*, stated that he had no objections *for any of the defendants* to the admission of these exhibits. (R. 469). Almost all of these exhibits were checks of the Thrift Corporation to pay debts of Mr. Temple, arising *prior* to the dates involved in the indictment.

Preston Robertson testified to a loan, when shown U.S. Exhibit 81, made on March 11, *1959*, for $1950.00. He *assumed* from the records that the loan was negotiated by Mr. Temple. (R. 478.) No objection was made to that testimony, nor was a motion to strike the same made.

M. D. Madden, an employee of the Northwest Airlines in St. Paul, testified that U.S. Exhibit No. 85 was a cancelled check of the Thrift Corporation, dated January 21, 1960, to the order of the Northwest Airlines. (R. 483.) During the discussion of the admissibility of that check, Mr. Temple's attorney stated—"I have offered to stipulate the facts and the records, already." (R. 484.) This check was issued to replace a check of Mr. Temple, which had been returned for not sufficient funds (R. 485) and is-

dated November 10, 1959. When Exhibits 85 and 86, a record of Mr. Temple's account at the Bank of Lincolnwood, were tendered, Mr. Temple's attorney stated that he had "no objections" to their admission. Exhibit 86 is a memo of the Citizens Southern Bank of East Point, Georgia to the Northwest Airlines, stating— "We have today, 11/30/59 charged your account not sufficient funds check of Paul Temple . . .$33.94."

Henry Senow, a partner of Graphic Copy Corporation of Illinois, produced invoices billed to Paul Temple & Associates, for work done in March and July of 1959 amounting to $480.36 and $37.75 respectively. When these invoices, Exhibits 88 and 89, were offered in evidence, Mr. Temple's attorney said—"no objection for Mr. Temple" (R. 504.)

The Circuit Court of Appeals for the Fifth Circuit stated, "We are asked to invoke the plain error rule in several respects; no objection having been made to the admission of certain evidence or to the argument thereon . . ." The complaint of the petitioner is more serious and broader than that encompassed in the foregoing remarks of the Court of Appeals. The petitioner's counsel, in almost every instance, *stated* that he had no objection to the admission of the foregoing specified instances. In *Michelson* v. *United States*, 335 U.S. 469, 475, 93 L. Ed. 168, 69 S.Ct. 213, this Court condemned the foregoing type of prejudicial evidence, in the following language:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer* v. *United States*, 245 U.S. 559, but it simply closes the whole

matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, *it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge*. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice". (Emphasis supplied.)

Mr. Temple would have been in a much better position in the Court of Appeals if his attorney had kept silent instead of affirmatively telling the trial court that he had no objection to the admission of the foregoing inadmissible and prejudicial testimony and evidence. Under such circumstances, Mr. Temple could urge plain error in this court. *Screws* v. *United States*, 325 U.S. 91, 107; *United States* v. *Atkinson*, 297 U.S. 157, 160.

Michelson holds that the testimony regarding many bills incurred by Mr. Temple and the issuance of not sufficient funds checks are erroneous.

The Court of Appeals for the Fifth Circuit failed to follow one of its decisions on this point. In *Dowell, Inc.* v. *Jowers*, 66 F.2d 214, 221, that court observed:

> "The power of an appellate court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case.
>
> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because a counsel has not properly pro-

tected his client by timely objection, error which has been waived below may be considered on review." (Citing *Hormal* v. *Helvering*, 1941, 312 U.S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037.)

How much less protection is accorded a defendant when his attorney affirmatively states that he has no objection to the admission of testimony and evidence of a type so severely condemned by this Court in *Michelson*. This can only be explained by the incompetence or gross negligence of counsel.

The prejudice to Mr. Temple by this foregoing inflammatory, inadmissible evidence, was aggravated by the following argument of the District Attorney to the jury (R. 994-995):

> "I recall the evidence that he was paying for clothes and so forth, back here, that was purchased in '58; and he had all these little, insufficient funds checks. Here was apparently a man who really knew the insurance business up one side and down the other; a man with legal training; a man who had made a fortune in his lifetime, but he was broke. He was desperate. He hadn't put a merger together since 1957 for Hogan, and he didn't have any money. He had to make some money some way, and he knew enough about insurance business that he thought he could pull it off, and he almost did. He almost did. He almost pulled a million and a half dollars swindle, or possibly more, if he got a-hold of Eagle Fire. A man who went out and purchased thirty-five hundred dollars of clothes at one time, and two hundred and sixty-eight dollars suits, but he hadn't paid for those, but, boy, when he got this Georgia Casualty money he sure did start paying off those little insufficient fund checks; thirty-three dollars in one, and a hundred and twenty-nine dollars in another, that were over-due.

> "If this was just a mistake, if it was just an account that had been overdrawn, why he was he so anxious to pay these things off immediately, not out of his personal account by Thrift Corporation, with Georgia Casualty money?"

No objection was made to the foregoing prejudicial argument to the jury by Mr. Temple's attorney; no motion to strike was made, nor any motion to withdraw a juror and declare a mis-trial.

This type of inflammatory argument to a jury was condemned by this Honorable Court in the case of *Berger* v. *United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314.

The Court of Appeals should have noted the inflammatory argument to the jury as plain error. *Screws* v. *United States*, 325 U.S. 91, 107; *United States* v. *Atkinson*, 297 U.S. 157, 160.

On the question of whether the Sixth Amendment was satisfied in the trial court, the Court of Appeals for the Fifth Circuit, stated:

> "The further contention that appellant was denied the assistance of counsel as afforded by the Sixth Amendment has also been considered. We are satisfied from a perusal of the record that appellant's trial counsel satisfied the requirement of that Amendment in full measure. *Popeko* v. *United States*, 5 Cir., 1961, 294 F.2d 168."

Popeko distinguishes between the incompetence or gross negligence of counsel appointed by the trial court and counsel selected by the defendant. The Sixth Amendment does not make any such distinction. This Honorable Court has never made such a distinction and should determine whether the latent or patent intent of the Sixth Amendment justifies any such distinction.

This opinion states that a lawyer may be so grossly negligent in his defense of a defendant as to deprive the defendant of the assistance of counsel; this is a situation in appellant's trial.

The opinion of the Court of Appeals is in conflict with its own foregoing decision, and has decided Federal questions in a way that are in conflict with the applicable decisions of this Court, heretofore pointed out; this calls for an exercise of this Court's power of supervision.

II.

Were the letters described in Counts 8, 10, 11, 12, 13 and 14 mailed for the purpose of executing the scheme described in the indictment?

Each of Counts 8, 10, 11, 12, 13 and 14, on which the petitioner, Temple, was found guilty, charge that the envelope mailed for the purpose of executing the scheme, contained a letter addressed to all stockholders of the Georgia Casualty & Surety Company, and a business reply card with a stockholder proxy thereon (R. 16). This letter is defendants' Exhibit 21 and is dated January 20, 1960. It is signed by D. D. Dominey, Jr. and stated that because of the inadequate capital and surplus of the Georgia Casualty Company it was found increasingly more difficult to compete with larger companies; that the Georgia Casualty received a proposal to merge with the Eagle Fire Insurance Company and that the directors have favorably considered a proposal to merge with the Eagle Fire Insurance Company by an exchange of stock.

This letter states that the merger will be effected by an exchange of stock on the ratio of one and one-half shares of the common stock of the Georgia Casualty to one share of the common capital stock of the Eagle Fire Insurance Company. A combined statement of the assets, capital

and surplus of each company is attached thereto, and a notice of a special meeting of the stockholders of the Georgia Casualty and Surety Company, to be held on January 30, 1960 at 1:00 P.M., for the purpose of acting upon the merger and consolidation agreement. An addressed postal card was also included, appointing a proxy to vote at that meeting for or against the proposed consolidation.

Title 18-1843.1 of the Statutes of the State of Georgia, provides that any Georgia corporation may merge with a corporation organized under the laws of any other State or Country. The merger shall be accomplished according to the provisions of the Sections 22-1839 through 22-1843. (See Appendix "C".)

Title 22-1839 of Georgia Statutes, provides that the merger agreement shall be submitted to the stockholders of each corporation at a meeting called separately for the purpose of voting upon said merger. A notice of the said meeting, its place and object, shall be given in accordance with the terms of the Charter and By-laws of the said corporation to each stockholder of record. (See Appendix "C".)

Mr. D. D. Dominey, Jr., the Secretary of Georgia Casualty & Surety Company, testified that the By-laws of the company required a 7 days' or 10 days' notice to the stockholders of any special meeting of the stockholders. (R. 591.) Either delivering the notices to the shareholders or mailing them was mandatory under the Statutes of Georgia and the By-laws of the Georgia Casualty & Surety Company. The notices were mailed.

The mailing of a thing which the law requires to be mailed, may not be regarded as mailed for the purpose of executing a scheme to defraud. *Parr v. United States*, 363 U.S. 370, 390-391, 80 S. Ct. 1171, 4 L. Ed. 2d 1277. In

Stapp v. *United States*, 120 F. 2d 898, 899, the Court of Appeals for the Fifth Circuit, held:

> "The mailing or causing the letter to be mailed is the crime, and it is vital to the commission of the offense that the letter be in furtherance of the scheme."

In *Kann* v. *United States*, 323 U.S. 88, 95, 65 S. Ct. 148, 89 L. Ed. 88, 96, this Court stated:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is an integral part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

It should be noted that the Court of Appeals observed: "The promise of merger, although premised largely on hope, was not completely without substance."

The opinion of the Court of Appeals for the Fifth Circuit is in conflict with its opinion in *Stapp*, and in conflict with the applicable decisions of this Court heretofore cited; this calls for an exercise of this Court's power of supervision to the end that the judgment of the Court of Appeals and the trial court should be reversed because there was no proof of a mailing for the purpose of executing the scheme to defraud.

III.

Did not the Trial Court err in limiting the defendant's right to a cross-examination, in directing that only one counsel among three lawyers representing three defendants could cross-examine government witnesses notwithstanding that the Trial Court reserved the right to each attorney to ask any special questions that relate to his client, and further stating that he didn't want three general cross-examinations?

After the direct examination of the Government's first witness, J. Austin Dilbeck, when he was tendered for cross-

examination the following colloquy between Court and counsel took place (R. 96-97):

> The Court: Now, Gentlemen, can you agree upon one of you counsel to conduct the cross examination in chief, reserving the right to each member to ask any *special* questions that relates to his client; can you do that?
>
> Mr. Andrews: Yes, sir. *If I understand*, Your Honor would like for one, whichever one happens to be most *familiar*, to determine among ourselves, and then the others have any *additional* questions that they will ask *them* if there are *additional* or if they are required.
>
> The Court: So long as they are not repetitious; *I don't want three general cross examinations*. I don't think you are entitled to that; I want each one of you to have a full opportunity to cross examine the witness with respect to any *material matter*, but I just don't want the cross examination repeated.
>
> Mr. Andrews: May we have a little huddle about that, Your Honor?
>
> Mr. Whaley: May it please the Court, as to this witness counsel have asked me to cross examine him in chief, with the right for them to ask any questions as to their clients. I would like to say that it will cover some of the transactions with Mr. Temple, since that is the bulk of his testimony. My interest is in Mr. Bishop, but I will cover that as part of the cross examination in chief, Your Honor.

This left to the attorneys for the three defendants then on trial the burden of determining what questions they could not ask the witnesses. The interpretation the attorneys placed upon the Court's direction is indicated by the foregoing statement of Mr. Whaley to the Court.

Repetition of a question put to a witness on cross-examination often produces a favorable change in the witness' testimony. The so-called repetitious question may be put to a witness in different words and language and this is frequently done by good cross examiners. The language used by one attorney will differ from that used by other attorneys. The question by one attorney to a witness may be clearer than that put by other attorneys on the same subject matter.

Certainly, the direction of the Court imposed a restriction on the cross examination of said witnesses by the defendants' attorneys. Each attorney was entitled to a *general* cross-examination of each witness for the Government. It is true that the Trial Court stated that the attorneys had a full opportunity to cross examine the witness with respect to "any *material* matter". The Court permitted counsel to ask any *special* questions that relate to his client. No one can determine how the Court's order limited each attorney for the defense in making a thorough cross examination. The Court's order placed each attorney for the defendants on a Procrustian bed.

Let us turn to the testimony of D. D. Dominey, Jr. (R. 585-604.) Mr. Whaley, attorney for the defendant, Roy Bishop, cross-examined Mr. Dominey. (R. 589.) Then Mr. Edwards, attorney for the defendant, Eva Woodall, conducted further cross examination. (R. 597.) When it came to Mr. Andrews, the Court asked: "Any further questions of this witness?" The reply to that question was: "No questions for Mr. Temple." The Petitioner's attorney interpreted the Court's direction to mean that the one "who happens to be most familiar", should cross examine the witness, Dilbeck. He should have been most familiar with Mr. Temple's defense and the cross examination of Mr. Dilbeck.

A thorough cross examination should have been made in behalf of Mr. Temple, particularly with respect to U.S. Exhibit No. 104, which was an old notice of a shareholders' meeting, dated March 30, 1955. He testified that "this was a document passed on to me by Miss Woodall. Some parts of it were passed to me from Mr. Temple" (R. 587). Mr. Dominey should have been cross examined in behalf of the Appellant, to determine what parts of U.S. Exhibit No. 104 were passed on to him "from Mr. Temple".

Dominey testified that Exhibits 21 and 22 were prepared in "our office", at the instructions of Mr. Temple, Miss Woodall, and Mr. Bishop (R. 588-589). Later, on cross examination by Mr. Bishop's attorney, he testified, with respect to Exhibits Nos. 21 and 22: "I prepared this, not under my own supervision: Miss Woodall was in the office and directed me how to fix it, and how to fix it up and how to fix the proxy up in some cases" (R. 590-591).

It appears on further cross examination, that while all this was going on between Dominey and Miss Woodall, Temple *was still* in talking to Dominey, Sr. (R. 597-598). Then later, with respect to U. S. Exhibit 104, Dominey testified that "it was a proxy from Eagle Fire that had been, she had certain places, or Mr. Temple had certain places that they wanted marked out, and other things put in".

A vigorous cross examination of D. D. Dominey, Jr. on the foregoing repugnant statements would have revealed either his bias, or the falsity of his testimony. *But Mr. Temple's attorney did not cross examine him.*

The foregoing restriction on cross examination by defendant's counsel is prejudicial. Quoting an excerpt from the case of *Resurrection Min. Co. v. Fortune Gold Min. Co.*,

8 Cir., 129 F. 668, 674, the Circuit Court of Appeals for the First Circit, said in *Galindes* v. *United States*, 19 F. 2d 352, 353:

> "A fair and full cross examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege of the party against whom he is called, and a denial of his right is a prejudicial and fatal error."

See also *Alford* v. *United States*, 282 U.S. 687, 691.

A particularly important statement by the Supreme Court of the United States, appears in the case of *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680. The Court stated, at page 67:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

In a recent case pending in the Supreme Court of the United States, *Ferguson* v. *United States*, 84 S.Ct. 479 (Memo), the Court entered the following order:

> "Motion of the United States to remand granted. Judgment of Court of Appeals vacated and case remanded to that court with directions to determine whether, in the light of the relevant circumstances, the trial court's ruling that only one of the two defense counsel would be allowed to question each prosecution witness on cross examination constitutes error of such magnitude as to require a reversal under the plain error rule."

In *Ferguson*, the situation was slightly more serious. The Trial Court directed the second attorney to submit his questions of cross-examination to the first attorney.

The Fifth Circuit Court of Appeals disposed of the foregoing situation as follows:

> "The trial court suggested that the cross-examination in chief be conducted by one of the three lawyers for the defense, with the other two having the right to ask such special questions as might relate to his client. There was no objection to this procedure. All counsel seemed to have been well satisfied with it. It was a matter within the discretion of the court and there was clearly no abuse of that discretion. Thus it is that we do not reach any question of plain error for there is no error at all in these contentions."

The opinion of the Court of Appeals is in conflict with an opinion of the Court of Appeals for the First Circuit and Eighth Circuit, and the applicable decisions of this Court.

This Court should determine whether the error of the Trial Court is of such magnitude as to require a reversal under the plain error rule.

IV.

Did not the Court err in instructing the jury: by giving confusing instructions, by giving instructions repugnant to each other, and by giving an instruction suggesting that the defendant was impeached?

The trial court instructed the jury (R. 1011-1012):

> "In order to establish proof that a defendant *or any other person* was a party to, or a member of *some common plan or arrangement*, the evidence must show that the plan was formed and that the defendant.

or other person who is claimed to have been a member, knowingly participated in *the plan* with the intent to advance or further some object or purpose of the plan.

"In determining whether or not a defendant *or other person* was a party to or a member of *a common plan*, the jury is not to consider what others may have said or done; that is to say, the membership of a defendant *or other person* in a *common plan* must be established by evidence as to his own conduct, what he himself said or did.

"If and when it appears from the evidence that a *common plan* did exist, and that a defendant was one of the members, then the acts thereafter knowingly done and the statements thereafter knowingly made *by any person* likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts or statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done during the continuance of such *common plan*. Any admission or incriminating statement made outside of Court *by one person* may not be considered as evidence *against any person* who was not present and heard the statements made."

This instruction was confusing to the jury by using the phrase "*or any other person*" repeatedly. It was only necessary to prove that the named defendants, Temple, Woodall and Bishop, were members of the scheme charged in the indictment. The use of the phrase "some common plan or arrangement" permitted the jury to consider a scheme not charged in the indictment. The instruction further permitted the jury to consider the statements made by *any person* found to be a member, as evidence against *the defendant*, in the absence and without the knowledge of *the defendant*.

There was testimony in evidence that Twombly of Stieglitz & Company was active in some plan, and that he was involved in the creation of the escrow agreement dated January 21, 1960. He, Mr. Temple, Mr. Rosenman and Mr. Schildkret, went to the escrow agent and signed that agreement on the aforesaid date (R. 696-697). D. D. Dominey, Jr. signed the letter that was mailed to the shareholders named in Counts 8, 10, 11, 12, 13 and 14 of the indictment. This letter is dated January 20, 1960 and appears in defendants' exhibit 21 and recommends a vote favorable to the proposal to merge the Georgia Casualty with Eagle Fire Insurance. Neither of these men was named in the indictment as a defendant, yet they could come within the description of "any other person" who were "parties or members of some common plan."

It is impossible to determine what prejudicial effect the foregoing instruction may have had on the jury. The instruction is manifestly erroneous, and error presumes prejudice. An instruction must not be confusing.

In rejecting an instruction offered by the defendants, the Court of Appeals for the Second Circuit, in *Kreiner* v. *United States*, 11 F.2d 722, said at page 726:

> "While the Government must prove guilt, and prove it beyond a reasonable doubt, a court should be careful to refuse an instruction the effect of which, in the form in which it is presented, is only to mislead and confuse the jury."

In *Miller* v. *United States*, 10 Cir., 120 F.2d 968, 972, the Court held:

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so formed that a jury may not draw the wrong conclusion therefrom."

This Court, in an elaborate statement on the subject here under discussion, observed, in *Bollenbach v. United States*, 326 U.S. 607, at page 613:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks."

Title 18 U.S.C., Sec. 1341, punishes whoever devises a scheme to defraud or obtain money or property by false pretenses who

> (1) ". . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post-office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom any such thing or matter,
>
> (2) 'or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined or imprisoned or both."

Counts 7 through 14 charge the defendants with violating paragraph (1) of the aforesaid statute; each of said counts respectively charges that the defendants, for the purpose of executing said scheme, did "unlawfully, wilful

ly and knowingly cause to be placed in an authorized depository for mail matter", the respective envelopes described in each of said counts. (R. 12-16.)

Paragraph (1) of the aforesaid statute does not require the allegations that the defendants "unlawfully, wilfully and knowingly, caused the said letters to be mailed." The word "knowingly" is only found in paragraph (2) of the aforesaid statute.

The Court instructed the jury that Counts 8, 10, 11, 12, 13 and 14 of the indictment, each charges the defendants, for the purpose of executing the said scheme and artifice to defraud, did *cause* to be placed in an authorized depository for mail matter in Atlanta, Georgia, the respective letters described in each of said counts. (R. 1002.)

It must be noted that this description of the charges in the indictment given to the jury, omits the words "unlawfully, wilfully and knowingly" which appear in the indictment.

There is a vast difference between charging that one "knowingly" placed a letter in a mail depository and charging that he did so "wilfully". As used in the indictment, the word "knowingly" merely states that the defendant knew that the letters were placed in a depository for mail. The word "wilfully" means much more. In a United States Statute which punished any railroad who knowingly and wilfully failed to properly feed and water animals, a penalty of $100.00 to $500.00 was recoverable. Sections 3 and 4, 45 U.S.C.A. §§ 73, 74. On certiorari to the Circuit Court of Appeals for the Fifth Circuit, the Supreme Court distinguished the two words. In the case of *United States v. Illinois Central R. Co.*, 303 U.S. 239, 242, 58 S. Ct. 533, 534, this Court stated:

> "The case depends upon the meaning of the phrase 'knowingly and willfully' . . .

"Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is also shown "willfully" to have failed. In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States* v. *Murdock*, 290 U.S. 389, 394, 54 S.Ct. 223, 225, 78 L.Ed. 381, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'. The significance of the word 'willfully' as used in section 3, 45 U.S.C.A. § 73, now before us, was carefully considered by the Circuit Court of Appeals for the Eighth Circuit in *St. Louis & S. F. R. Co.* v. *United States*, 169 F. 69. Speaking through Circuit Judge Van Devanter, now Mr. Justice Van Devanter, the court said (page 71): '"Wilfully" means something not expressed by "knowingly" else both would not be used conjunctively. ' * *."

The Court, however, told the jury that Counts 8, 10, 11, 12, 13 and 14 of the indictment each charges the defendants with causing to be placed in an authorized depository for mail matter, a certain letter. But, the indictment charged much more: it charged the defendants with unlawfully, knowingly and wilfully causing the letters to be deposited. The Court thereby permitted the jury to find the defendants guilty on each of said counts by a degree of evidence much less than the allegations of the indictment required. This constituted an amendment of the indictment such as is condemned in *Stirone* v. *United States*, 361 U.S. 212, 216-218 and *Russell* v. *United States*, 369 U. S. 749, 770-771.

At a later point in the Court's instructions, we find the following statement to the jury:

> "You will note that the acts charged in the indictment alleged that they were done wilfully. An act is done wilfully if done voluntarily and purposely with the specific intent to do what the law forbids: that is to say, with evil motive or bad purpose, either to disobey or disregard the law."

Nothing is said with reference to the foregoing instruction that the jury must find, beyond a reasonable doubt, that the defendants did the acts charged in the indictment "wilfully". It thus appears that confusion must have arisen in the minds of the jurors, because the latter instruction is just "hanging in the air", without any direction to the jurors as to what they should do about it. If it can be inferred that the jurors were required to find, beyond a reasonable doubt, that the defendants *wilfully* caused the letters to be placed in the mails, then a repugnancy between the two instructions arises; and it becomes impossible to determine which instruction the jurors followed. *Bollenbach* v. *United States*, 326 U.S. 607, 614; *Nicola* v. *United States*, 72 F.2d 780, 787; *United States* v. *Donnelly*, 7 Cir., 179 F.2d 227, 238; *Patterson* v. *United States*, 5 Cir., 183 F.2d 687, 690. These cases hold that it is reversible error to give repugnant instructions to a jury.

In its opinion, the Court of Appeals for the Fifth Circuit stated:

> "The charge has been carefully considered, and taken as a whole it was proper, adjusted to the evidence, and legally correct. The assignments of error based on the charge are without merit, over and above the fact that no objections were lodged to those portions of it now asserted as error. Rule 30, F.R. Crim.P."

This holding is in conflict with decisions of the Court of Appeals for the Second, Seventh, Ninth and Tenth Circuits and with its own opinion in the case of *Patterson* v. *United States*, 5 Cir., 183 F.2d 687, 690, and is in conflict with the applicable decisions of this Court. This Court should therefore exercise its supervisory power to correct the opinion of the Fifth Circuit Court of Appeals.

CONCLUSION.

Counsel respectively submits that this is a proper case to justify this Court's attention. It is unfortunate that after diligent, conscientious research and preparation of petitioner's briefs in the Court of Appeals for the Fifth Circuit, the Court will describe the errors assigned as being without merit.

Respectfully submitted.

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